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In the Supreme Court of the United States

October Term, 1952.

No. 336

E. C. JOHNSON and LEILA B. JOHNSON, doing business as The Bramhall Company, *Petitioners*,

vs.

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

E. C. Johnson and Leila B. Johnson, doing business as The Bramhall Company, pray that a writ of certiorari issue to review the judgment entered in this case on July 17, 1952, by the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW.

The opinion of the Court of Appeals (R. 35-41) has not yet been reported. The opinion of the District Court (R. 28-30) is reported at 100 F. Supp. 491.

JURISDICTION.

The judgment of the Court of Appeals was entered July 17, 1952 (R. 41). The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1).

QUESTION PRESENTED.

The question presented by this petition is whether persons engaged in the production of crushed rock entirely within a single state, which is sold in the same state to others who use it entirely within the same state for the maintenance and repair of instrumentalities of commerce, are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, 29 U. S. C. A. §§201-219.

STATEMENT.

This case arose upon a complaint filed in the United States District Court for the Western District of Missouri by the respondent, Secretary of Labor, to enjoin the petitioners from alleged violations of the Fair Labor Standards Act, as amended, with reference to overtime pay and record keeping. In substance, the petition (R. 1-4) alleges that the petitioners are engaged in the production of crushed rock and related products at certain quarries and plants within the State of Missouri, that a substantial part of the petitioners' production is sold to various municipalities, and to the United States, for use in maintaining and repairing highways and roads, and for revetments in the Missouri River, that such highways and roads, and the river, are instrumentalities of interstate commerce, and that the petitioners are therefore engaged in "the production of goods for commerce" within the meaning of the Fair Labor Standards Act, as amended. (It is not alleged that petitioners are engaged "in commerce.") The petition further alleges that the petitioners have violated the Act by failure to pay their employees one and one-half times their regular rates for hours worked in excess of forty in work-weeks of over forty hours, and by failure to keep records required. An injunction is prayed. The answer (R. 4-5) in substance admits the factual allegations of the complaint, and denies that the petitioners are engaged in the production of goods for commerce or are otherwise subject to the provisions of the Act. The answer moves to dismiss the complaint for failure to state a claim upon which relief

can be granted. At a pre-trial conference, the following facts, among others, were agreed upon (R. 26):

> "It is further stipulated and agreed between the parties that none of the products manufactured by the defendants as alleged in the Amended Complaint were shipped out of, or at any time moved out of the State of Missouri; that all of said products were produced within the State of Missouri, and were sold and delivered to purchasers within the State of Missouri, for use entirely within the State of Missouri, and that none of the products were placed by the defendants upon any roads or highways, or any place in the Missouri River, or upon any instrumentality in interstate commerce."

The case has been the subject of two proceedings in the District Court. In the case of the original complaint, which differed from the present one in no way here material, the District Court sustained petitioners' motion to dismiss. The case was remanded by the Court of Appeals on the ground evidence should have been taken. *McComb, Administrator,* v. *Johnson et al.,* 174 F. (2d) 833 (8th Cir., 1949). Thereafter, the respondent here was substituted as plaintiff, the present amended petition was filed, and the case was tried by the District Court. The respondent's evidence consisted chiefly of the facts admitted pursuant to a request for admissions compiled by the respondent (R. 6-18), and certain other data appearing in petitioners' own records (R. 18-26). In brief, this evidence showed that a large part of petitioners' production was sold to the United States, and to the Missouri Highway Department and certain municipalities, and was used by the purchasers in the Missouri River and for the maintenance and improvement of certain named highways, and that some interstate traffic moved over the river and the highway concerned. It was stipulated that

no crushed rock was used for original construction. The Court thereafter filed a memorandum opinion again dismissing the complaint (R. 28-30), on the ground that no portion of the materials produced by the petitioners was moving in commerce, and that they were not producing goods for commerce. The respondent appealed. The Court of Appeals for the Eighth Circuit reversed, directing the District Court to enter the injunction prayed (R. 35-41), on the ground that the "production of material designed to be placed upon interstate highways and upon structures in rivers carrying interstate commerce must be held to be production of 'articles of (transportation)'." (R. 40.)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that the amended complaint states a claim upon which relief can be granted.

(2) In holding that petitioners, when producing and selling crushed rock and allied products to others in the same state to be used by others for the repair and maintenance of instrumentalities of commerce located entirely in the same state, are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, as amended.

(3) In directing that an injunction issue to require petitioners to conform to the provisions of the Act.

REASONS RELIED ON FOR GRANTING THE WRIT.

I.

The decision below is in conflict with the decision of another Court of Appeals on the same matter.

The decision below, to which the prayer for the writ is directed, is in conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *E. C. Schroeder Co., Inc.*, v. *Clifton, et al.*, 153 F. (2d) 385 (10th Cir., 1946), *cert. den.* 328 U. S. 858, 90 L. Ed. 1629 (1946).

In this case, the action was for overtime of employees engaged in a quarry in mining and processing stone for gravel cushion and riprap in the construction of relocated portions of a railroad and highway. Congress had authorized the construction of a dam on the Red River. It became apparent that water impounded would flood a portion of the track of a railroad and of an Oklahoma highway, both arteries of interstate commerce. Contracts were let for the reconstruction of the highway and railroad. The contractors on the highway and railroad projects acquired leases on property where the rock could be produced, and contracted with the E. C. Schroeder Company to furnish the necessary machinery, equipment and labor to produce and deliver the gravel in the trucks of the contractor, f.o.b. the quarry. This case also involved a dike project which was the subject of a separate ruling by the court. With reference to the production of rock used upon the relocated highway and railroad, the court said: (l. c. 388, 389)

> "The very language of the Act relating to the production of goods for commerce seems to make it clear that the particular work of the employee, or the integrated effort of which his service is a part,

must have for its purpose the production of goods for transportation in commerce. Some goods or some commodities must be produced for movement in commerce. That must be the purpose of the work of the particular employee or of the integrated effort of which his work is a part. * * * Here, it was not intended that any of the cushion gravel and riprap would ever move in interstate commerce. It was understood from the beginning that it would be produced, processed, and transported to points on the relocated segments of the railroad and the highway, all within the same state. The work of the employees in question, either separate and distinct or as an integral part of the integrated effort, did not have for its purpose the production or manufacture of any goods or commodity for movement in interstate commerce. Their work was not directed to the production or manufacture of anything for commerce, within the meaning of the Act. *They were engaged in local business.*" (Emphasis added.)

It will be noted in this case, that the employees concerned did not place the rock upon the highway and railroad but delivered it to the contractors who did so—just as in the case below.

In the *Schroeder* case, the other question presented was that of the employees who were producing rock to riprap a dike built to protect an oil field from being flooded by the dam which had necessitated the relocation of the highway and railroad. The oil field had been discovered, and oil was being produced and was moving in interstate commerce before work on the dam was commenced. Here the court held that the employees so engaged bore such a close and immediate tie to the integrated effort to effectuate the continued movement of oil in commerce, that they themselves were engaged in the production of goods for commerce. This view of the

court was expressly overruled by the Congress in passing the Fair Labor Standards Amendments of 1949. In the statement of the House members of the conference committee, it is expressly observed that the holding in the *Schroeder* case with reference to the workers producing rock for the oil field dikes is an example of the type of case "in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production." *Conference Report on H. R. 5856, the Fair Labor Standards Amendments of 1949,* H. R., 81st Congress, 1st Session, Report No. 1453, October 17, 1949. 95 Cong. Rec. 14995.

Another case involving a conflict with the *Schroeder* case has arisen in the Third Circuit in *Tobin* v. *Alstate Const. Co.,* 195 F. (2d) 577 (3rd Cir., 1952). A petition to review the decision of the Court of Appeals for the Third Circuit in the *Alstate* case is now before this Court. In the *Alstate* case the Court held that off the road employees engaged in producing a bituminous concrete road material within the State of Pennsylvania solely from materials quarried within Pennsylvania and sold within Pennsylvania for use on Pennsylvania roads were engaged in the production of goods for commerce. The only difference in the factual situation in the *Alstate* case from the instant case is that some *Alstate* employees put the material produced on the roads. In the instant case, petitioners' employees did not. Petitioners sold their product to others (R. 26), who put it in place.

In the present case, the Eighth Circuit Court of Appeals followed the decision in the *Alstate* case (R. 39), citing in support of its conclusion in this regard *Roland Electric Company* v. *Walling,* 326 U. S. 657, 90 L. Ed. 383 (1946), holding that work "necessary to the production

of" an article to be transported in commerce constituted "production of goods for commerce" though the actual thing produced by the Roland Company did not itself move in commerce. (By the Amendment of 1949, the Congress changed the word "necessary" in the Act to "directly essential," 29 U. S. C. A. 203(j) as amended October 26, 1949.)

This is familiar doctrine in the construction of the Fair Labor Standards Act. But it is not applicable here since the case below involves nothing that moves across state lines. There was no production for commerce, as defined in the Act, to which the production of the crushed rock was "necessary." "Commerce" is defined in the Act as "trade, commerce, transportation, transmission, or communication among the several states" 29 U. S. C. A. 203(b). This is pointed out by the Supreme Court of Pennsylvania in *Adam Thomas* v. *Hempt Brothers*, 371 Pa. 383 (1952), decided after the decision in the *Alstate* case. That court stated:

> "The case of *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, which the *Alstate* opinion cites, is not presently in point. The employees who were there held to be under the Act made parts of electric motors which were used, inter alia, to manufacture goods for commerce. Consequently, under the definition of 'produced' in §3 (j) of the Act, such employeees were held to be in an occupation necessary to the production of goods for commerce. The relation was direct and immediate. In *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C. A. 5), upon which the *Alstate* opinion also relies, the employees of an electrical company whose power was utilized in commerce and for the production of goods in commerce were likewise held, under the broad definition of 'produced' in §3 (j), to be in an occupation necessary to the production of goods for commerce. There

> is no similarity between the facts of these cases and the 'off-the-road' employees of the instant case."

There is no way to reconcile the decision in the Tenth Circuit in the *Schroeder* case, and the decision in the Eighth Circuit in the present case, or that of the Third Circuit in the *Alstate* case. The present case is one "involving principles the settlement of which is of importance to the public as distinguished from that of the parties, * * * where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *N. L. R. B.* v. *Pittsburg S. S. Co.*, 340 U. S. 498 at 502, 95 L. Ed. 479 at 582 (1951). The matter here involves the public interest. Sand, gravel and crushed rock because of their nature are commonly not transported far. Instrumentalities of commerce such as highway departments and railroads are large users of these products. In the United States in 1949, the last year for which final figures are available, 319,104,000 short tons of sand and gravel were produced, and 224,026,570 short tons of crushed stone. *Minerals Yearbook* (1949), Bureau of Mines, Department of the Interior, pp. 1069, 1131. It would be difficult to determine how much of this product moves in commerce, but the amount must be relatively small for the reason noted. Until the conflict between the circuits is resolved no one in this vast industry can be sure whether they are or are not subject to the Fair Labor Standards Act.

It might also be observed that the Wage and Hour Administrator deemed the matter of sufficient public importance to issue a ruling thereon in 1942 which held the industry *not* subject to the Federal Labor Standards Act. See Wage and Hour Release G-162, Paragraph VI, issued May 15, 1941. The Administrator further deemed

the situation to be of sufficient public importance to reverse his decision in 1945. See Wage and Hour Release A-14, 1945 W. H. Man. 1497, issued March 13, 1945.

II.

The decision below is without basis in law, is unconstitutional, and decides an important federal question in a manner contrary to the probable decision in this Court.

This Court has held since the earliest judicial interpretations of the Fair Labor Standards Act of 1938 that the scope of the Fair Labor Standards Act is not coextensive with the limits of the power of Congress over commerce and that Congress intended to reserve the regulation of local businesses to the states even though such businesses might "affect" commerce. Thus, in *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 86 L. Ed. 1638 (1942), it is stated: (l. c. 316 U. S. at 522-3)

> "The Administrator does not contend that the employees in the cases before us are within the Act because Congress could have placed them there. The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' See H. Rep. No. 2182, 75th Cong., 3d Sess., p. 2; 83 Cong. Rec. 7749, 7750. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong., 3d Sess., pp. 29, 30; 83 Cong. Rec. 9158, 9266, 9267. Moreover, in one of its intermediate stages, the measure incorporated the Shreveport doctrine, Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 58 L. Ed. 1341, 34 S. Ct. 833, supra, in that it was specifically made applicable to intrastate production which competed with goods pro-

> duced in another state. S. 2475, 75th Cong., 3d Sess., as recommitted December 17, 1937, Section 8 (a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, supra, as reported April 21, 1938; see H. Rep. 2182, supra."

The court had previously stated in the same opinion: (l. c. 316 U. S. at 521-2)

> "Congress may choose, as it has chosen, frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the states activities which, if isolated, are only local. * * * The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

Again, in *Walling* v. *Jacksonville Paper Company,* 317 U. S. 564, 87 L. Ed. 460 (1943), the court reiterates: (l. c. 317 U. S. at 570)

> "In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. S. Rep. No. 884, 75th Cong., 1st Sess., p. 5; 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 8, p. 9169. Moreover, as we stated in A. B. Kirschbaum Co. v. Walling, supra (316 U. S., pp. 522, 523, 86 L. Ed. 1646, 1647, 62 S. Ct. 1116), Congress did not exercise in this Act the full scope of the commerce power."

Further, in *McLeod* v. *Threlkeld*, 319 U. S. 491, 87 L. Ed. 1538 (1943), the court states: (l. c. 319 U. S. at 493)

> "In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' Sections 6 and 7. See the discussion and reference to legislative history in A. B. Kirschbaum Co. v. Walling, 316 U. S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116, and Walling v. Jacksonville Paper Co., No. 336, October Term, 1942 (317 U. S. 564, ante, 460, 63 S. Ct. 332). The selection of the smaller group was deliberate and purposeful."

The business of petitioners is entirely local. No products on which petitioners' employees work cross state lines. No products on which petitioners' employees work compete with products crossing state lines. By reason of its nature crushed rock is never shipped far. No products on which petitioners' employees work are ingredients necessary to the production of other goods for commerce. It is impossible to connect hours spent by petitioners' employees in the manufacture of crushed rock with the finding and declaration of policy contained in Section 2 of the Act (29 U. S. C. A. §202; 52 Stat. 1060). It cannot be said that petitioners are:

(1) Causing commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate (substandard) labor conditions among the workers of the several states.

(2) Burdening commerce and the free flow of goods in commerce.

(3) Unfairly competing in commerce.

(4) Creating labor disputes burdening and obstructing commerce and the free flow of goods in commerce, or

(5) Interfering with the orderly and fair marketing of goods in commerce.

Congress has emphasized its desire not to extend the coverage of the Fair Labor Standards Act to purely local businesses. *Conference Report on H. R. 5856, the Fair Labor Standards Amendments of 1949,* H. R., 81st Congress, 1st Session, Report 1453 at par. (2) and (3) thereof, October 17, 1949. 95 Cong. Rec. 14995. In view of this Court's repeated recognition of the limits of coverage under the Fair Labor Standards Act, petitioner feels that the decision below was contrary to the decision that would be rendered by this Court under the facts involved.

Further, it is impossible to reconcile the decision below with that in *McLeod* v. *Threlkeld,* 319 U. S. 491, 87 L. Ed. 1538 (1943). In this case a cook and caretaker for a crew engaged in the maintenance of a railroad right-of-way sued his employer for wages and overtime based on the Fair Labor Standards Act of 1938. It was urged by the employee that the employer was engaged both in commerce and in the production of goods for commerce. In reply to the contention that the employee's work had been the production of goods for commerce, i.e., the furnishing of food to an instrumentality of commerce, the Supreme Court stated: (l. c. 493)

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause."

It is also impossible to reconcile the decision with the weight of prior authority. We have discussed the case of

E. C. Schroeder Co., Inc. v. *Clifton*, 153 F. (2d) 385 (10th Cir., 1946), *cert. den.* 328 U. S. 858, 90 L. Ed. 1629 (1946). The matter has also been before the Federal District Court in New Jersey.

In *McComb* v. *Trimmer et al.*, 85 F. Supp. 565 (N. J., 1949), it was held that the production of rock and stone for use on interstate highways does not constitute the production of goods for commerce. Defendant operated a stone crushing plant. His employees hauled stone from the mine to the crusher, but the crushed stone was delivered to the county at the crusher. The Administrator sought an injunction against defendant which was denied. The court stated: (l. c. 570)

> "The business in which defendants' employees are engaged is local in nature. Ultimately its product will be employed upon highways carrying interstate commerce. There is no immediacy to commerce on their part. The material they produced is picked up on the premises of the defendants in trucks of, and by, the county, hauled to highways where needed, and they have nothing to do with its transportation or its final incorporation into the highways. There is no more reason to say that they are engaged in the production of goods for commerce than to say they are engaged in commerce. They come strictly within the classification well adopted by other courts of 'off the road' employees and are not contemplated for coverage by the Act." (Emphasis added.)

Again, in *Wiley et al.* v. *Stewart Sand & Material Co.*, 206 S. W. (2d) 362 (Mo. App., 1947), the Kansas City Court of Appeals held that employees engaged in quarrying and crushing rock sold to others who used it in the repair of highway and railroad roadbeds were not en-

gaged in the production of goods for commerce. The court stated: (l. c. 365)

> "The very language of the Act relating to the production of goods for commerce seems to make it clear that the particular work of the employee, or the integrated effort of which his service is a part, must have for its purpose the production of goods for transportation in commerce. Some goods or some commodities must be produced for movement in commerce. * * *
>
> "In the instant case the plaintiffs were engaged in work, the purpose of which was, to produce rock for use on the highways and railroad beds within the State of Missouri. The rock was sold to various contractors at the plant, and neither these plaintiffs nor any of the defendant's employees participated in placing the rock in or upon the highway or railroad bed. The mere fact that goods produced by others for interstate commerce may be transported over the highways or the railroad tracks, will not bring these plaintiffs within the purview of the Act. Their work was not directed to the production or manufacture of anything for commerce, within the meaning of the Act. They were engaged in local business."

To the same effect are *Walling* v. *Craig et al.*, 53 F. Supp. 479 (Minn., 1943); *Ramos, et al.* v. *P. R. Cement Corporation* (not officially reported) (PR, 1946), 10 Labor Cases, para. 63,000, p. 68,775; *Zehring et al.* v. *Brown Materials, Limited, et al.*, 48 F. Supp. 740 (S. D. Calif., 1943); *Adams* v. *Wewoka Brick & Tile Company* (not officially reported) (E. D. Okla., 1942), 5 Labor Cases, para. 61,069.

The decision below was of an important federal question. Various phases of it have been the subject of consideration by the Supreme Court previously. The decision of an important Federal question not previously

passed on by the Supreme Court is a basic reason for granting certiorari. See *Worcester County Trust Company* v. *Riley*, 302 U. S. 292, 82 L. Ed. 268 (1937). A further reason for granting certiorari exists when the decision is probably in conflict with the applicable decisions of this Court. See Rule 38, par. 5(b), *Supreme Court Rules*.

CONCLUSION.

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

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